Supreme Court, U.S.
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No. 01-1316

IN THE SUPREME COURT
OF THE UNITED STATES

CITY OF SEATTLE,

Petitioner,

v.

NICK FURFARO; BRANDY KIDDER;
ESMERALDA SILVA; and JJR, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court for the State of Washington

PETITIONER'S REPLY BRIEF

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13

Table of Contents

Page

REASONS FOR GRANTING THE WRIT 1

A. The Washington Supreme Court wrongly extended significant new First Amendment protections to non-expressive conduct in contravention of this Court's prior decisions 1

1. This Court does not consider all acts by nude entertainers to be expression 1

2. The underlying decision was based on First Amendment grounds 2

a. *O'Day* includes analysis on federal grounds 3

b. The Washington Supreme Court did not "merely apply" state law to resolve this case 4

B. This Court should set the proper level of First Amendment protection for these arrests 7

C. This Court has jurisdiction to consider the case 7

CONCLUSION 10

Table of Authorities

Page

Cases

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) 1

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 1, 3, 5, 6

Cox Broadcasting Corp v. Cohn, 420 U.S. 469 (1975) 7, 8, 9, 10

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 1

Everett v. Heim, 71 Wn.App. 392 (1993), *rev. denied* 123 Wn.2d 1018 (1994) 4

Kitsap County v. Kev, Inc., 106 Wn.2d 135, 720 P.2d 818 (1986) 5

Miami Herald Publishing Co. v. Tornillo, 418 U.S.241 (1974) 9

O'Day v. King County, 109 Wn.2d 796 (1988) 2, 3, 4, 5, 6

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 1

Texas v. Johnson, 491 U.S. 397 (1989) 1

Statutes

28 U.S.C. § 1257 8

42 U.S.C. § 1983 ..... 6, 7, 9

Other Authorities

Article I, § 5 of the Washington Constitution 3

First Amendment to the Washington Constitution 1, 2, 3, 4, 5, 7, 8, 9, 10

REASONS FOR GRANTING THE WRIT

A. The Washington Supreme Court wrongly extended significant new First Amendment protections to non-expressive conduct in contravention of this Court's prior decisions.

1. This Court does not consider all acts by nude entertainers to be expression.

The Washington Supreme Court has incorrectly interpreted *City of Erie v. Pap's A.M.*[1] Petition at p. 12; Pet. App. 17-18. Based upon *Pap's A.M.*, the Washington Supreme Court imposed a requirement of obscenity upon *every* probable cause determination for arrests under Seattle's adult entertainment ordinance. The City maintains that the extension of these new First Amendment protections is contrary to prior decisions of this Court, including *Pap's A.M.* itself.

Respondents[2] mention the case only once, noting that the Washington court relied upon *Pap's A.M.* in holding nude dancing to be expressive conduct. Opposition at 12. Furfaro makes absolutely no mention of the additional cases set forth by the City as being in conflict with the analysis utilized by and new protections issued by the Washington Supreme Court in this case: *Texas v. Johnson, Doran v. Salem Inn, Inc., Barnes v. Glen Theatre, Inc.,* and *Paris Adult Theatre I v. Slaton.* See, Petition at pp. 14-21. Furfaro cites no case from this Court supporting the *degree of protection* extended by the underlying court.

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[1] 529 U.S. 277 (2000).

[2] Hereinafter, collectively "Furfaro."

There was no evidence at trial that Silva or Kidder intended to convey an expressive message *when committing the acts observed by Detective Swanson.* Neither plaintiff admitted to the accused acts, nor did either testify that the accused acts were expressive. Instead, they denied committing the accused acts, and testified that their dances were substantially similar to a "clean" videotaped dance that was shown to the jury.

The jury found that the officers had probable cause to make conduct arrests, for the very prohibited acts that were disavowed by Kidder and Silva. Any testimony of intent to express ideas during non-proscribed conduct is irrelevant. Given the absence of testimony regarding intent to accomplish expression during the forbidden sex acts, the error of the underlying court's decision is magnified.

2. <u>The underlying decision was based on First Amendment grounds.</u>

Rather than providing any prior decision of this Court to support the new First Amendment protections, Furfaro now contends that "the Washington Supreme Court merely applied this Court's general probable cause test to the Seattle ordinance as judicially construed in *O'Day.*"[3] Opposition at 11. In other words, Furfaro attempts to characterize the underlying decision as resting upon state law, in an attempt to avoid this Court's review.

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[3] *O'Day v. King County,* 109 Wn.2d 796 (1988).

First, Furfaro's portrayal of *O'Day* as a case limited to state law is inaccurate. Second, the Washington Supreme Court in this case went well beyond *O'Day*, specifically basing its rulings upon *Pap's A.M.* The underlying case was not resolved on state law grounds, and this Court should address the propriety of the new First Amendment protections wrongly extended by the Washington Supreme Court.

a. *O'Day* includes analysis on federal grounds.

Furfaro contends that the "decision in *O'Day* was expressly based upon Article I, § 5, the free expression clause of the Washington Constitution, rather than the First Amendment." Opposition at 9. In reality, the *O'Day* opinion includes analysis based upon the federal constitution as well. Regarding the overbreadth challenge to King County's ordinance, the *O'Day* court cited *both* federal and state cases before concluding that "Because the Washington Constitution is less tolerant than the First Amendment of overly broad restrictions on speech, we must apply the standard of article 1, section 5 in considering whether KCC 6.08 is overbroad." *O'Day*, 109 Wn.2d at 804. The court decided to "construe the ordinance to restrict only conduct and unprotected obscene expression." *Id.* at 806.

The *O'Day* court utilized both state and federal law to evaluate the stage requirement as well: "Before we consider whether the stage requirement is a valid time, place, and manner restriction, we must determine whether it regulates protected expression or whether it regulates only conduct. Pure conduct does not enjoy

the protections of either article 1, section 5 *or the First Amendment.*" *Id.* at 809 (citation omitted, emphasis added). Ultimately, the court found the stage requirement to regulate only conduct, not expression:

> We hold that it regulates only conduct, which is not protected under article 1, section 5 *or the First Amendment*.

Id. at 810 (emphasis added).

O'Day certainly does not establish obscenity as an element of the crime, pursuant to either state or federal law, for every arrest under King County's ordinance. Washington courts have already rejected such an argument, in *Everett v. Heim*, 71 Wn.App. 392 (1993), *rev. denied* 123 Wn.2d 1018 (1994)[4]. The Heim court, relying on *O'Day*, rejected an adult entertainer's contention that the trial court erred in failing to include obscenity as an element of the crime under an ordinance similar to *O'Day*. 71 Wn.App. at 395-396. As a result, her criminal conviction was upheld.

b. The Washington Supreme Court did not "merely apply" state law to resolve this case.

The Washington Supreme Court in this case noted that its own statements supporting First Amendment protection for nude dancing, including statements in *O'Day*, "have been carefully qualified."[5]

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[4] Cited by the Washington Supreme Court below at Pet. App. 17.

[5] Pet. App. 8. The court went on: "In *O'Day v. King County*, 109 Wn.2d 196, 803, 749 P.2d 142 (1988), this

The court then explicitly deferred to more recent decisions from this Court - *Barnes* and *Pap's A.M.* - as being more authoritative holdings regarding "the amount of protection given to nude dancing by the First and Fourteenth Amendments to the United States Constitution." Pet. App. 9.

Assessing the required elements of probable cause for a lawful arrest under Seattle's ordinance, the court again mentioned its prior decision in *O'Day*. Pet. App. 17. First, the court recognized the City's argument that its police officers could have probable cause to make arrests for conduct, as opposed to expression. Second, the court acknowledged that "the *O'Day* court agreed with the trial court that the performances engaged in by the defendants, evidently table dances or lap dances, constituted pure conduct unprotected by free expression guarantees." *Id.* Had the *O'Day* opinion been applied without regard to the subsequent decision from this Court in *Pap's A.M.*, it is obvious that the Seattle police officers would have been permitted to make arrests for such conduct, without any requirement to consider obscenity as part of the probable cause determination. After all, according to *O'Day*, the performances by Kidder and Silva could be considered conduct, unprotected by the First Amendment.

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court said, citing *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 140, 720 P.2d 818 (1986), that 'although the First Amendment protects the communication and expression of a nude dancer, public nudity itself is conduct subject to regulation.'" *Id.* at 8-9. Thus, under *O'Day* as interpreted by the court below, all conduct by an adult entertainer is not presumed expressive.

Of course, the Washington Supreme Court went on to interpret this Court's holding in *Pap's A.M.* Pet. App. 17-18. The Washington Supreme Court relied upon *Pap's A.M.*, not *O'Day*, in deciding that all acts of nude dancers are to be automatically afforded the full protection due expressive conduct: in this case, a requirement of obscenity as part of the probable cause evaluation to support a lawful arrest.

Furfaro posits that "the Washington Supreme Court drew a fact-based distinction." Opposition at 13. Of course, any such distinction rests entirely upon the court's conclusion that the *Pap's A.M.* decision from this Court settles the degree of protection to be afforded nude dancing (and all acts arguably committed during a dance). The court relied upon an erroneous interpretation of this Court's prior decisions.

Furfaro's attempt to characterize the court's decision below as a state law issue is surprising, given Furfaro's motion for reconsideration. The Washington Supreme Court initially remanded for trial only claims under 42 U.S.C. § 1983, potentially foreclosing Furfaro from arguing its state constitutional claims for injunctive relief. Of course, the Washington Supreme Court also acknowledged that state law violations do not give rise to § 1983 claims. While Furfaro successfully obtained reinstatement of their state claims, the procedural history clearly demonstrates that the Washington Supreme Court arrived at its decisions based upon federal rather than state grounds.

B. This Court should set the proper level of First Amendment protection for these arrests.

Furfaro does not contest the fact that the level of protection afforded to adult entertainers at arrest under the Fourth Amendment presents important constitutional issues. Given that presumptive free speech protections have been reserved for pure speech, it is important for this Court to clarify that conduct arrests for adult entertainers need not automatically include a determination of obscenity.

C. This Court has jurisdiction to consider the case.

The Washington Supreme Court's ruling below sets the First Amendment standard which will govern the Fourth Amendment analysis at trial. In order for the plaintiffs to prevail on their claims under 42 U.S.C. § 1983, they must prove that there was no probable cause for their arrests. Under the present standard, the arresting officers needed to have probable cause to believe that the acts they witnessed were obscene, in order to make a lawful arrest. Absent review by this Court, all further proceedings will be governed by this new and incorrect First Amendment standard.

The case is presently remanded for a new trial. However, *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469 (1975), notes that:

> the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in

> which there are further proceedings in the lower courts to come. There are now *at least* four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts.

420 U.S. at 477 (emphasis added).

Under *Cox*, this Court should treat the decision of the Washington Supreme Court on the federal issue as a final judgment. This is a situation "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action..." 420 U.S. at 482-483. The City maintains that the federal issue would completely obviate the need for further proceedings. Without the new First Amendment protections created by the underlying court, the jury's verdict and the trial court's disposition of all claims would stand undisturbed, and police officers could continue to make lawful arrests where they had probable cause to believe that adult entertainers had committed criminal conduct.

On the other hand, if the case is allowed to proceed to trial, it is possible that a jury will find that

the arresting officers did, in fact, have probable cause to believe that the acts they witnessed were obscene. If the City prevails on the § 1983 claims, it will have no opportunity to subsequently challenge the underlying ruling by the Washington Supreme Court. The City ought not be potentially foreclosed from obtaining this Court's corrective attention regarding the Washington Supreme Court's newly formulated First Amendment protections, which are currently afforded as a matter of law in all arrests under Seattle's adult entertainment ordinance.

As noted by *Cox*, "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue..." 420 U.S. at 483. There is no dispute that the arrest criteria for officers enforcing adult entertainment ordinances, while suspects seek refuge within the First Amendment, presents important federal questions. As this Court noted in *Cox*, when discussing the most recent case in this very category:

> Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of § 104.38 could only further harm the operation of a free press.

Cox, 420 U.S. at 484-485 (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S.241 (1974) (additional citations omitted). It would be similarly intolerable to leave

municipalities, police officers, and women claiming to perform expressive sex acts with the present, unsettled posture of Seattle's adult entertainment ordinance.

Furfaro concedes that its contingent cross-petition satisfies this same exception from *Cox*. Cross-Petition at 27. The City's petition satisfies the exception as well.[6] For all of the above reasons, the Court should exercise its jurisdiction under *Cox* and grant the petition for the writ of certiorari.

CONCLUSION

Absent review by this Court, police officers in Washington will effectively be prohibited from arresting adult entertainers for simple criminal conduct. Instead, adult entertainers will be free to commit any conceivable act, secure in the knowledge that their actions are presumptively afforded the status of expression protected by the First Amendment. There are important Constitutional considerations at stake, regarding the degree of First Amendment protection extended to nude adult entertainers upon arrest, and officers' determinations of probable cause that a crime has been committed in their presence. The City respectfully requests that this Court grant its petition for a writ of certiorari.

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[6] Furfaro attempts to argue that its issues satisfy *Cox*, while the City's appeal somehow fails the same test. Cross-Petition at 27. However, Furfaro admits that "Each of these three issues is inextricably intertwined with the others." *Id.* at 10. Thus, Furfaro cannot reasonably contest jurisdiction under *Cox*.